BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 2.59.1701 pertaining to definitions; the adoption of NEW RULES I through IX regarding mortgage loan originator licensing; and the repeal of ARM 2.59.1705 pertaining to continuing education provider requirements	)))))))	NOTICE OF AMENDMENT, ADOPTION, AND REPEAL

TO: All Concerned Persons

1. On April 29, 2010, the Department of Administration published MAR Notice No. 2-59-431 pertaining to the public hearing on the proposed amendment, adoption, and repeal of the above-stated rules at page 945 of the 2010 Montana Administrative Register, Issue Number 8.

2. The department has adopted New Rules II (2.59.1726), III (2.59.1727), IV (2.59.1728), V (2.59.1729), VI (2.59.1730), VII (2.59.1731), and IX (2.59.1733) exactly as proposed.

3. The department has amended ARM 2.59.1701 as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

2.59.1701 DEFINITIONS For purposes of the Montana Mortgage Broker, Mortgage Lender, and Mortgage Loan Originator Licensing Act and this subchapter, the following definitions apply:

(1) remains as proposed.

~~(2) "Compensation or gain" means the receipt or the expectation of receiving anything of value in conjunction with offering or negotiating terms of a residential mortgage loan and is not limited to payments that are contingent upon the closing of a loan.~~

(3) through (12) remain as proposed, but are renumbered (2) through (11).

AUTH: 32-9-125, 32-9-130, MCA
IMP: 32-9-102, 32-9-103, 32-9-109, 32-9-116, 32-9-117, 32-9-120, 32-9-122, 32-9-123, 32-9-125, 32-9-127, 32-9-133, MCA

4. The department has adopted New Rules I (2.59.1725) and VIII (2.59.1732) as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

NEW RULE I (2.59.1725) LICENSING EXEMPTIONS AND VOLUNTARY REGISTRATION BY EXEMPT ENTITIES WITH THE NATIONWIDE MORTGAGE LICENSING SYSTEM (NMLS) (1) through (3) remain as proposed.

(a) ~~(i)~~ whose income is not more than two times ~~at or below~~ the U.S. Department of Health and Human Services Poverty Guidelines for Montana in effect at the time the loan application is processed, adjusted for size of household, as published in the Federal Register under authority of 42 USC 9902(2);

(b) ~~(ii)~~ whose income does not exceed ~~80~~115% of the median income in the applicable area of Montana as determined by the U.S. Department of Housing and Urban development, adjusted for size of household; or

(iii) remains as proposed, but is renumbered (c).

AUTH: 32-9-130, MCA
IMP: 32-9-104, MCA

NEW RULE VIII (2.59.1732) MORTGAGE CALL REPORTS ~~(1) The mortgage call reports required to be submitted to the NMLS by mortgage brokers and mortgage lenders must be submitted on the form required by NMLS as frequently and on such dates as the NMLS sets.~~

(2) remains as proposed, but is renumbered (1).

AUTH: 32-9-130, MCA
IMP: 32-9-151, MCA

5. The department has repealed ARM 2.59.1705 as proposed.

6. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

Comment 1: Both oral testimony at the rule hearing and a written comment were received from counsel for State Farm Insurance Companies (State Farm) and State Farm Bank, F.S.B. (bank) relating to proposed New Rule I. The bank is a federally chartered savings bank that offers financial products including limited loan products exclusively through State Farm agents. State Farm agents are independent contractors and not bank employees.

The commenter stated that the department's proposed New Rule I and the statement of reasonable necessity for the rule appear to contemplate an exemption from the registration requirement of the law only in the context of the employer-employee relationship. The commenter stated independent contractors should be exempt from registration requirements provided there are adequate assurances of consumer protection. The consumer protection assurances recited by the commenter in support of its position were: 1) the bank is highly regulated by the federal Office of Thrift Supervision (OTS); 2) OTS confirmed in writing that State Farm agents who participate in activities of the bank are subject to OTS regulation; 3) OTS, at its discretion, may conduct on-site examinations at the offices of State Farm agents and does so in conjunction with bank examinations for the purpose of reviewing the banking activities and, thus, the bank is legally responsible for the actions of State Farm agents engaged in mortgage origination and lending activities;

4) compliance oversight of the bank and its exclusive State Farm agents is provided by dedicated bank staff; 5) the bank benefits from cooperative efforts of the State Farm Marketplace Compliance department (Marketplace Compliance) which oversees both sales and service compliance groups that assess and monitor the performance of State Farm agents; 6) Marketplace Compliance has a field presence throughout the United States; and 7) as a condition of participating in marketing of the bank's financial products, State Farm agents must agree to comply with all laws and regulations and all bank guidelines, procedures, and policies.

The commenter stated the rule and the statement of reasonable necessity should be amended to ensure that State Farm agents can continue to provide State Farm customers in Montana with financial products offered by the bank exclusively through State Farm agents.

Response 1: The subject matter of the comment is outside the scope of proposed New Rule I. MAR Notice No. 2-59-431 did not put the public on notice that this rulemaking would interpret the word "employee" as found in the definition of "registered mortgage loan originator" in 32-9-103(29)(a), MCA. "Registered mortgage loan originator" means an individual who (a) meets the definition of a mortgage loan originator and is an "employee" of: (i) a depository institution; (ii) a subsidiary owned and controlled by a depository institution and regulated by a federal banking agency; or (iii) an institution regulated by the farm credit administration; and (b) is registered with and maintains a unique identifier through NMLS. The definition comes from the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 found in Title V of the Housing and Economic Recovery Act of 2008, 12 USC 5102(7), (SAFE Act). Nor did MAR Notice No. 2-59-431 put the public on notice that this rulemaking would consider whether an independent contractor mortgage loan originator acting for an entity that is exempt under 32-9-104 (1)(b), MCA, is exempt from licensing requirements under 32-9-104(1)(c), MCA. The requested amendment to proposed New Rule I and statement of reasonable necessity must be denied on that basis. In addition, the department may not engraft "independent contractors" onto 32-9-103(29)(a), MCA, which refers only to "employees."

Because licensed mortgage loan originators must work only for a licensed "employing" mortgage broker or mortgage lender under 32-9-116, MCA, a definition of "employing" was previously included in MAR Notice No. 2-59-414, implementing 32-9-116, MCA. The Notice of Amendment, Repeal, and Adoption for MAR Notice No. 2-59-414 was published on February 11, 2010. Under ARM 2.59.1701, "employing" is defined as "the entity for which the individual works is liable for withholding payroll taxes pursuant to Title 26 of the United States Code." The definition is not consistent with an independent contractor relationship. There is no sound reason for employment to mean one thing with respect to the relationship between a mortgage loan originator and the mortgage broker or mortgage lender for whom they originate loans, but have a different meaning regarding the relationship between a mortgage loan originator and a depository institution for whom they originate mortgage loans.

Under 39-71-417(4)(a)(i), MCA, in order to obtain an independent contractor certification, an individual must affirm they have been and will continue to be free from control or direction over their work performance. That principle of the independent contractor relationship is inconsistent with the supervision and control of mortgage loan originators by their employers that the Montana Mortgage Broker, Mortgage Lender, and Mortgage Loan Originator Licensing Act (the Act) requires under 32-9-122(5), (6), and (7), MCA.

It is unclear to the department whether the commenter's position is that independent contractor State Farm agents involved in mortgage loan origination or lending activities are or should be exempt not only from state licensing requirements under the Act, but also from "registration requirements" for loan originator employees of depository institutions, subsidiaries owned and controlled by depository institutions and regulated by a federal banking agency, or institutions regulated by the farm credit administration. If so, the issue of exemption from registration requirements is not within the jurisdiction of the department. Rather, registration of such employees through Nationwide Mortgage Licensing System (NMLS) in lieu of state licensure is a matter within the jurisdiction of the Federal Financial Institution Examination Council (FFIEC) compromised of the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the National Credit Union Administration, the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Farm Credit Administration. FFIEC will adopt rules implementing registration through NMLS of exempt mortgage loan originators "employed by": (i) a depository institution; (ii) a subsidiary owned and controlled by a depository institution and regulated by a federal banking agency; or (iii) an institution regulated by the farm credit administration, under the federal SAFE Act. The FFIEC's draft final rule is now under review by the U.S. Office of Management and Budget. The comment period is closed. A number of comments were received by the FFIEC requesting that "employee" as used in the registration context be defined. In response, the draft final rule states that Congress used the term "employee" without defining it and in the past when that has occurred, the Supreme Court has concluded that Congress intended to describe the conventional master-servant relationship as understood in the context of common-law agency doctrine. The draft final rule states that the FFIEC thus intends the meaning of employee under the SAFE Act and under its rule to be consistent with the right-to-control test under the common law agency doctrine. The FFIEC also noted that the right-to-control test is used by the IRS as its basis for classification of workers as employees and the results of the test determine whether an institution files a W-2 or a 1099 for an individual.

The commenter did not specify whether the mortgage loan origination and lending activities of independent contractor State Farm agents pertain to commercial mortgage loans or exclusively to residential mortgage loans. The Act applies only to residential mortgage loans as that term is defined in 32-9-103(30), MCA.

The commenter did not provide a copy of the "written confirmation" from the OTS referred to in the comment, which reportedly addresses OTS's regulatory oversight

of independent contractor State Farm agents. OTS has had the right to examine the institutions that it regulates and to review records pertaining to the institutions' banking business, wherever those records may be found, including presumably, in the offices of independent contractor State Farm agents who market State Farm Bank, F.S.B.'s financial products and originate mortgage loans funded by the bank. In the department's opinion, that does not constitute OTS regulatory jurisdiction over independent contractor State Farm agents.

Comment 2: A representative of a community-based 501(c)(3) not-for-profit corporation (nonprofit) commented on the definition of "bona fide low-income individual" contained in proposed New Rule I. The nonprofit stated that it participates in an FHA-insured mortgage financing program for lower-income persons. The borrowers' household annual income may not exceed 115% of area median income, as determined by the U.S. Department of Housing and Urban Development (HUD), when adjusted for family size.

The commenter also stated it participates in the U.S. Department of Health and Human Services Assets for Independence (AFI) program. Grant monies awarded to qualifying nonprofits and governmental agencies, are used to match earned income saved by lower-income persons in special savings accounts. The account, including the match funds, can be used to acquire a first home mortgage, among other purposes. Persons generally qualify for the program if they are eligible for Temporary Assistance to Needy Families (TANF), Federal Earned Income Tax Credit (EITC), or have income less than two times the federal poverty line.

The commenter requested that the definition of bona fide low-income individual in the rule be amended to ensure that the nonprofit's exempt status would apply to its participation in both of the above-referenced assistance programs.

Response 2: The department agrees that New Rule I should be amended largely as requested to ensure that 501(c)(3) nonprofit corporations, which are not otherwise engaged in or holding themselves out to the public as being engaged in the mortgage loan business, are able to fully participate in governmental housing assistance programs without a license. A person whose income is at or below the federal poverty line might not be able to afford a mortgage, so it is not unusual for the income eligibility cap for housing assistance programs to be in excess of the federal poverty threshold. The department believes it needs to define "bona fide low-income individuals" in reference to individuals' income and not by reference to their eligibility for Temporary Assistance to Needy Families (TANF) or Federal Earned Income Tax Credit. The department believes that if individuals are eligible for those programs, benefits, or tax credits, they will likely meet the income-based definition of "bona fide low-income individuals" included in New Rule I.

The intent to exempt such nonprofits from licensure requirements would be defeated if the definition of "bona fide low-income individuals" in rule sets an income cap so low that it ensures qualifying nonprofits will have to be licensed in order to participate

in some programs regardless of its exemption for purposes of participating in other housing assistance programs.

The department and HUD recognize that it will take time to fully implement the requirements of the SAFE Act as reflected in the Act as they relate to licensing of mortgage loan originators working for 501(c)(3) nonprofit corporations that meet the criteria for entity exemption from licensing requirements under 32-9-104(1)(j), MCA. The department's intent is not to cause the exempt nonprofit entities to cease and desist from the important work they do, particularly during this time when the need for their services is greatest, so long as a good faith effort is being made by the 501(c)(3) corporations to meet the deadlines set in statute for licensing their mortgage loan originators.

Comment 3: A licensed mortgage broker commented that New Rule I(3) defining bona fide low-income individual is unclear and asked whether a mortgage broker that is "low-income" is exempt from having to be licensed.

Response 3: New Rule I(3) does not exempt any individual or entity from the licensing requirements of the Act based on the individual or entity's income. Rather, (3) merely defines the term "bona fide low-income individual" contained in 32-9-104(1)(j), MCA. This is the statute that exempts 501(c)(3) nonprofit corporations from the Act's licensing requirements provided that they are not otherwise engaged in or hold themselves out to the public as being engaged in the mortgage loan business and that they make mortgage loans to promote home ownership or improvements for "bona fide low income individuals". The term "bona fide low income individuals" refers to the clients of certain 501(c)(3) nonprofit corporations. Section 501(c)(3) nonprofit corporations meeting the criteria in 32-9-104(1)(j), MCA, are exempt from having to be licensed as mortgage brokers or mortgage lenders because of the low income clients that they serve. The definition of bona fide low income individual in rule will put nonprofit corporations on notice of the criteria that will be applied by the department to determine whether the clients/borrowers they serve are "bona fide low-income individuals" under 32-9-104(1)(j), MCA.

Comment 4: The commenter proposed an alternative definition of the term "mortgage loan servicer" in lieu of the definition of that term in the proposed amendments to ARM 2.59.1701. The commenter proposed that "mortgage loan servicer" be defined as "an individual, employed by a company which owns the loans or services the loans for others, who administers an existing mortgage loan, which may include but is not limited to explaining the terms of the loan or its escrow account, negotiating, amending or waiving the terms of an existing loan, and taking other actions including the collection of borrower information designed to prevent or avoid default or foreclosure in connection with an existing loan." The commenter stated that the alternative definition comes from a comment submitted by three groups (the American Financial Services Association, the Mortgage Bankers Association, and the American Bankers Association) to HUD on their pending rules implementing the SAFE Act. The commenter stated that since the department is

relying on HUD's proposed rule to define a "mortgage loan servicer" it should not make any decisions until HUD's rule is final.

The commenter stated that the issue relates to licensure, i.e., whether a person who does loan modifications must be licensed, and in that regard, a distinction needs to be made between: 1) the servicer who as part of their obligation must modify a mortgage loan when permissible at no cost to the borrower, and 2) the third party modification company paid by the borrower to negotiate a modification or refinance of a mortgage loan. The commenter stated the former should not have to be licensed while the latter should be licensed.

The commenter stated that the Farm Credit Administration and the federal banking agencies adopted a final rule on November 12, 2009, concluding that the SAFE Act's definition of "loan originator" in general excludes employees engaged in loan modifications or assumptions; consequently, the employees of depository institutions, subsidiaries owned and controlled by depository institutions and regulated by a federal banking agency, or a institution regulated by the Farm Credit Administration, will not be required to register with the Nationwide Mortgage Licensing System and Registry (NMLSR). The commenter stated that if licensing will be required for those engaged in loan modification work outside of that group, an unlevel playing field would result. The commenter provided a list prepared by the Mortgage Bankers Association showing that seven states have concluded that servicers and/or those engaged in loan modifications in some form are not covered by the SAFE Act, six states are covering servicers but delaying licensing them, and nine states are deferring to HUD. The commenter included Montana among the states deferring to HUD.

The commenter stated that now is not the time to hinder the mortgage loan modification process by requiring licensure of mortgage loan servicers. Any delay in providing help to borrowers in foreclosure, of which Montana has its share, should be avoided.

Response 4: The definition of mortgage loan servicer in the proposed amendment to ARM 2.59.1701 attempts to clarify that it is the activities that a person performs relating to residential mortgage loans and not their job title that determines whether they must be licensed. If the person engages in activities that fall within the definition of "mortgage loan originator" under 32-9-103(23)(a), MCA, regardless of their "mortgage loan servicer" job title, they must be licensed as a mortgage loan originator. The alternative definition of "mortgage loan servicer" requested by the commenter would shift the focus of the determination of who needs to be licensed from the nature of the mortgage loan-related activities performed to who owns the loan or pays the person performing the activities. Section 32-9-103, MCA, defines a number of job categories of individuals having some role or involvement with residential mortgage loans including "mortgage broker," "mortgage lender," "mortgage loan originator," and "loan processor or underwriter." In all of the definitions, it is the nature of the activities performed that distinguishes each from the others. Also, under 32-9-129(1), MCA, a loan processor or underwriter may not

represent to the public that they can or will perform any of the activities pertaining to originating a mortgage loan if they are not licensed as a mortgage loan originator. (Emphasis added.) HUD has stated in its rule proposal notice that definitions of terms are key to whether a person must be licensed and because of the great variety of business models utilized in the housing finance industry, the definitions are based on functions rather than on job titles or labels. The department believes that varying from the approach of focusing on the nature of the activities performed, would be inadvisable from a consistency standpoint and would not provide the best protection to consumers.

Regardless of who is paying the mortgage loan servicer to modify the mortgage loan or who owns the loan, the borrower is best protected when the person performing the activities understands Real Estate Settlement Procedures Act, Truth in Lending Act, and other laws applicable to mortgage loans, has completed educational and testing requirements for licensure, and has undergone the requisite background check and credit check. HUD noted in its rule proposal notice published in the Federal Register, Docket No. FR-5271-P-01, RIN 2502-A170, that today's loan modifications may include an increase or decrease in the interest rate, a change to the type of interest rate (e.g., fixed versus adjustable rate), extension of the loan term, increase or write down of principal, the addition of collateral, changes to provisions related to prepayment penalties and balloon payments, and even a change to the parties to the loan through assumption or the addition of a co-signer, all of which can make loan modifications virtually indistinguishable from doing a "refinance" which clearly requires a license.

The commenter stated that federal banking agencies have concluded the SAFE Act's definition of "loan originator" in general excludes employees engaged in loan modifications or assumptions; consequently, such employees of banking institutions and their subsidiaries regulated by banking agencies will not be required to register with the NMLSR. The commenter urges the department to adopt the same conclusion.

It is important to note, however, that a distinction exists between the SAFE Act's definition of "loan originator" and the definition of "mortgage loan originator" in both 32-9-103(23), MCA, and in the State Model Act. Section 32-9-103(23), MCA, and the State Model Act defined the term as an individual who for compensation or gain or in the expectation of compensation or gain does either of two things: (i) takes a residential mortgage loan application; or (ii) offers or negotiates terms of a residential mortgage loan. (Emphasis added.) In contrast, the SAFE Act defines "loan originator" as an individual who takes a residential mortgage loan application and offers or negotiates terms of a residential mortgage loan for compensation or gain. (Emphasis added.)

HUD's rule proposal notice states that since individuals performing loan modifications almost certainly offer or negotiate terms of a residential mortgage loan, the states with laws like Montana's already require licensure of individuals engaged in loan modification activities. HUD stated that a state's decision to cover, under its

licensing laws, those engaged in mortgage loan modification activities is fully consistent with the SAFE Act and that, in any case, states are free to exceed standards required by HUD.

For the foregoing reasons, the federal banking agencies' conclusion that loan modification specialists employed by depository institutions do not need to be registered through NMLSR is not persuasive to the department, which is implementing state law. That being said, an individual who does a loan modification for no compensation or gain does not meet the definition of a mortgage loan originator under 32-9-103(23), MCA, and would therefore not need to be licensed. The department has chosen not to adopt the definition of "compensation or gain" until HUD's final rules are adopted.

Comment 5: The commenter stated it is the nation's only centralized, 100% retail, 50-state, conventional and FHA residential mortgage lender that originates, processes, and closes loans over the Internet through a platform built to directly interface with homeowners using technology, metrics, and trained staff. It employs 1,400 loan officers each of whom must meet the licensing requirements of multiple states.

The commenter opposed proposed NEW RULE VIII relating to Mortgage Call Reports because the rule would vest power in NMLS to determine the "frequency" with which such reports must be submitted. The commenter stated that since NMLS is not a legislative or regulatory body but rather a data repository, the "content and frequency" of required call reports should be established through statute or rulemaking rather than dictated by a privately contracted organization.

The commenter opposed proposed NEW RULE IX relating to expunged criminal records and more generally commented that the statutory bar to licensure in both the SAFE Act and in the Act based on certain felony convictions is overbroad and unfair. The commenter gave an example of a presumably hypothetical license applicant with a felony conviction for DUI or possession of marijuana in the past seven years who would not be eligible for a license even though the crimes bear no relation to the person's ability to be a good mortgage loan originator. The commenter also stated it would be unfair to deny license renewal and permanently bar a presumably hypothetical renewal applicant from future licensure based on a felony conviction involving "fraud, forgery, embezzlement or financial transactions" if the person was convicted of fraudulent use of a credit card more than 20 years ago at age 17, but had been rehabilitated and had been a successful and honest mortgage loan originator for many years after the conviction.

The commenter acknowledged that the SAFE Act and the Act are clear with respect to the statutory prohibitions against licensing a person based on certain felony convictions and that the department cannot change that by rule. The commenter stated, however, that those acts are silent on the issue of expunged criminal records. The commenter stated that because the laws of the state where a person was convicted determine whether the offense was a misdemeanor or felony, it

should also be that state's laws that determine what effect the expungement of the record of conviction has on a person's eligibility for a Montana mortgage loan originator license under Montana law.

The commenter stated that the department would be improperly preempting state law if it brings back to life a conviction for which the record was expunged in another state in order to apply the criteria for license eligibility in a regulated field under Montana law. Expunged records, according to the commenter, are treated as if they never occurred. In some states, the record is made nonpublic and can be viewed and used for limited purposes, not including administrative licensing, while in other states the record is purged altogether.

The commenter stated there is more or better assurance that a person has been rehabilitated when the court having jurisdiction in the criminal case has expunged the record than if the person has been pardoned by a governor or by the President of the United States.

The commenter stated that for purposes of the NMLS registry of mortgage loan originators employed by depository institutions, the federal banking agencies propose to adopt FDIC's regulation excluding convictions from consideration if the record has been expunged. The commenter cited 12 USC 1829 and 12 CFR 303.220-3.

The commenter stated that adoption of proposed New Rule IX would be a rush to judgment, and the department should delay action on the rule until further guidance is rendered.

Response 5: Section 32-9-151, MCA, states the reports of condition (commonly referred to as call reports) must be in the form and must contain the information that the NMLS may require. That statute assures uniformity of the report format and content from state to state. A uniform call report should be advantageous to the commenter and other mortgage lenders and mortgage brokers that are licensed in multiple states. A legislative amendment to or a judicial decision invalidating 32-9-151, MCA, would be required before the department could adopt a rule to require that different or additional information be included in the call report than what the NMLS may require. The commenter stated that due dates for submission of call reports should be set by statute or through rulemaking rather than by NMLS. That statement is correct. Accordingly, the department is deleting (1) of the New Rule VIII and renumbering it (2).

Under 32-9-105(2)(b), MCA, the department is authorized to establish reporting dates necessary to comply with the nationwide mortgage licensing system and registry. When due dates for the reports are established by the NMLS, the department will initiate rulemaking to adopt those due dates in order to comply with the NMLS and to advance the objective of uniformity of processes among the states that is generally favored by the mortgage industry. The NMLS is currently proposing a quarterly reporting schedule. A uniform schedule for submission of call reports

among the states should be advantageous to mortgage brokers and mortgage lenders licensed in multiple states.

Sections 32-9-120(1)(b) and 32-9-127(4)(b), MCA, make clear that only after an individual or the individual's relevant conviction is pardoned will the conviction no longer be a bar to licensure. That provision is consistent with the SAFE Act, the Model State Act, and with HUD's proposed final rule. A pardon is a form of executive clemency. The term "pardon" is defined in 46-23-301, MCA, as a declaration of record that an individual is to be relieved of all legal consequences of a prior conviction. The department is aware of no legal support for the commenter's apparent assertion that expungement of the record of a conviction by a court has the same effect as pardon by a governor or the President of the United States. The department may not, through rulemaking engraft onto 32-9-120 and 32-9-127, MCA, through rulemaking "expungement" of the record of a relevant conviction as an additional circumstance under which the conviction will no longer be a bar to licensure.

Even a pardon that relieves an individual of all legal consequences of a conviction (including ineligibility for licensure based on the fact of a conviction) is distinguishable from the negation or extinguishment of the conviction altogether. For example, 46-23-510, MCA, states that upon final reversal of a conviction for certain crimes "the sentencing court shall order the expungement of any records kept by the court, law enforcement agency, or other state or local government agency under this part." In that example, it is the final reversal of the conviction and not the expungement of the records relating to it that negates the conviction. The conviction would be negated by the final reversal even if the court failed to expunge the records relating to it.

The commenter's recommendation to delay adoption of NEW RULE IX pending further guidance is not practical because state law is clear regarding the pardon exception, and the department may not expand upon the exception.

The federal banking agencies' (FFIEC's) final rules will govern registered mortgage loan originators employed by Montana depository institutions, whereas HUD's final rules implement the SAFE Act's minimum standards for state-licensed mortgage loan originators employed by mortgage brokers and nondepository mortgage lenders. The sets of rules are independent of each other. The department does not expect that HUD will conform its final rule to FFIEC's draft final rule relating to expunged records, but even if that occurs, states are free to set higher standards for the licensing of mortgage loan originators. Therefore, the department's rule relating to expunged records of convictions will not in any event be "in conflict" with the FFIEC's rules or with HUD's rules.

The department does not agree with the commenter's statement that Montana's proposed rule would improperly preempt another state's laws if the record of a felony conviction has been expunged by a court in the other state under its laws. "Expungement" of a record of conviction is an action taken by a court in the exercise

of its criminal jurisdiction. The court's order would determine the effect of the conviction thereafter when, for example, the state's laws provide for enhancement of sentence for a second or subsequent conviction, the applicability of a persistent felony offender status, or eligibility to have a sentence deferred again for a subsequent offense. The exercise by a court of its criminal jurisdiction in one state may not encroach upon the jurisdiction of an administrative agency in another state having exclusive jurisdiction over licensing persons to enter a regulated field in that other state.

The department believes that 32-9-120(1)(b) and 32-9-127(4)(b), MCA, prohibit licensure when there has been a "pretrial diversion" in the criminal case such as a period of deferred imposition of sentence at the conclusion of which the plea of guilt or nolo contendere to the relevant criminal charge is withdrawn and the charge is dismissed under 46-18-204, MCA. The department believes that withdrawal of plea and dismissal of a charge and making the records "nonpublic" following deferred imposition of sentence is what the commenter refers to as an "expungement" of the record of conviction. The department's inclusion of such a conviction in its consideration and application of 32-9-120(1)(b) and 32-9-127(4)(b), MCA, is consistent with both HUD's draft final rule as well as the FFIEC's draft final rule relating to pretrial diversions. As the commenter noted, the Federal Deposit Insurance Corporation (FDIC) does include "pretrial diversions" when applying 12 USC 1829, which bars persons convicted of certain crimes from serving on a bank's board of directors.

In the U.S. District Court for the Middle District of Pennsylvania, a person filed an action in the court to challenge a determination made by the Office of the Comptroller of the Currency (OCC) that the person had entered into a pretrial diversion program or similar program in connection with the dismissal of perjury charges and was therefore prohibited from resuming his position as chairman of the board of directors of a bank under 12 USC 1829(a)(1). The OCC moved for dismissal of the case on the grounds the court lacked jurisdiction. In its decision dated February 4, 2010, the court held that if it adjudicated the plaintiff's claims, that would affect the exercise of authority delegated to the OCC in 12 USC 1818, a result foreclosed by Congress in 12 USC 1818(i)(1). Consequently, the court granted the OCC's motion to dismiss the case for lack of jurisdiction. See, *Denaples v. Office of the Comptroller of the Currency* (2010), 2010 U.S. Dist. LEXIS 9702. The court's recognition of the executive branch agency's jurisdiction in civil administrative matters entrusted to it is consistent with the department's view of its jurisdiction under the Act to interpret and enforce the bars to licensure contained in 32-9-120(1)(b) and 32-9-127(4)(b), MCA.

The SAFE Act and the development of the NMLS and Registry did not create a "national license" such that every state must accept the minimum standards of other states or HUD. Each state is free to set higher standards for licensing mortgage loan originators.

No postconviction adjudication other than a final reversal of the conviction and no executive action other than a pardon of the conviction as defined in 46-23-301(1)(b), MCA, will negate the effect of a conviction for purposes of the department's enforcement of 32-9-120(1)(b) and 32-9-127(4)(b), MCA. A felony conviction of a person who was under 18 years old at the time of an offense, but who was charged and tried as an adult, will be treated the same as if the person had been an adult at the time of the offense.

The term "conviction" includes pretrial diversions including dismissals following deferred imposition of sentence under 46-18-204, MCA, or a similar statute in any other state. Inclusion of pretrial diversions within the term "conviction" is consistent with the position taken by the FFIEC (following FDIC's "Statement of Policy Pursuant to Section 19 of the Federal Deposit Insurance Act [12 USC 1829] Concerning Participation in the Conduct of the Affairs of an Insured Institution by Persons Who Have Been Convicted of Crimes Involving Dishonesty, Breach of Trust or Money Laundering or Who Have Entered Pretrial Diversion Programs for Such Offenses" as published in the Federal Register December 1, 1998, p. 66177). It is possible that HUD was referring to pretrial diversions such as dismissal following deferred imposition of sentence and expungement of the record when it concluded in its draft final rule that "expungement" of a record of a relevant conviction that would bar licensure does not negate the conviction for purposes of the SAFE Act prohibitions against licensing persons convicted of certain felonies.

The department has exclusive jurisdiction over the interpretation of 32-9-120(1)(b) and 32-9-127(4)(b), MCA, as the laws apply to applicants for licensure in a field regulated by it, subject to judicial review under Title 2, chapter 4, part 7, MCA.

As a practical matter, it is unlikely that the department will routinely learn of such pretrial diversions when the record has become nonpublic, confidential criminal justice information if the expungement occurred before the license application or renewal application is submitted. It is conceivable, however, that the department may learn of an undisclosed relevant conviction involving a pretrial diversion and will apply 32-9-120(1)(b) and 32-9-127(4)(b), MCA, and this rule.

The department is not aware of any evidence that a pardoned individual is less likely to have been rehabilitated than a person whose record of conviction was expunged by the court. In any event, the statutory bar to licensure or renewal under 32-9-120(1)(b) and 32-9-127(4)(b), MCA, is based on the objective fact of a conviction rather than the subjective fact of rehabilitation.

By: */s/ Janet R. Kelly*
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